United Nations S/2014/203

Security Council

Distr.: General
20 March 2014
English
Original: French

Letter dated 19 March 2014 from the Secretary-General addressed to the President of the Security Council

I have the honour to transmit herewith a copy of the letter from the Registrar of the International Criminal Court dated 28 January 2014, transmitting the decision of Pre-Trial Chamber I, entitled *Decision on the admissibility of the case against Abdullah Al-Senussi*, in the case of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*.

Pre-Trial Chamber I decided on 11 October 2013 that the case of Abdullah Al-Senussi was inadmissible before the Court, owing to the principle of complementarity set forth in article 17 (1) (a) of the Rome Statute.

By his letter, the Registrar conveyed the decision on the admissibility of the case for transmission to the Security Council, pursuant to article 17 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations. The Registrar also informed the Secretary-General that the decision had been appealed.

I should be grateful if you would have this letter and the summary of the decision on admissibility transmitted to the members of the Security Council. The full text of the decision (in English only) is available at the following address: www.icc-cpi.int/iccdocs/doc/doc1663102.pdf.

(*Signed*) **BAN** Ki-moon

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Annex

[Original: English]

I have the honour to refer to my letter of 15 October 2013 (see S/2013/649) which transmitted the "Decision on the admissibility of the case against Abdullah Al-Senussi" (ICC-01/11-01111-466-Red) issued by Pre-Trial Chamber I on 11 October 2013 for onward transmission to the Security Council in the case of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*.

In accordance with rule 59 (1) and (2) of the Rules of Procedure and Evidence, I hereby transmit a summary of the Decision for the purpose of informing the Security Council (see enclosure). I would like to add that the Decision was appealed by the Defence of Abdullah Al-Senussi on 17 October 2013 (ICC-01/11-01/11-468-Red) and that the appeal is still pending.

The situation in Libya was referred to the Prosecutor of the International Criminal Court in resolution 1970 (2011) adopted by the Security Council on 26 February 2011.

(*Signed*) Herman **von Hebel**
Registrar

Enclosure

Summary of the Decision on the admissibility of the case against Mr. Abdullah Al-Senussi

Pre-Trial Chamber I of the International Criminal Court decided today that the case against Mr. Al-Senussi is inadmissible before the Court under article 17 (1) (a) of the Rome Statute.

The Chamber issued a warrant of arrest against Mr. Al-Senussi on 27 June 2011 for the crimes against humanity of murder and persecution under article 7 (1) (a) and (h) of the Statute, committed in Benghazi, Libya, from 15 February 2011 until at least 28 February 2011.

Libya filed a challenge to the admissibility of the case against Mr. Al-Senussi on 2 April 2013 and the parties and participants to proceedings subsequently filed written submissions.

Libya submitted that its national judicial system had been actively investigating Mr. Al-Senussi since 9 April 2012. Libya argued that it had provided evidence with a high degree of specificity and probative value, sufficient to prove that it took concrete and specific investigative steps in relation to the same case as that before the Court. The domestic case, it argued, is much broader in subject-matter than the investigation of the Court, but encompasses it nonetheless. The investigations at the national level were said to extend from the 1980s through to the alleged attacks against civilians during the period from 15 February 2011, the commencement of the revolution, until the fall of the Gaddafi regime on 20 October 2011. Libya spelled out the crimes under which, it anticipates, the charges against Mr. Al-Senussi will proceed to trial and it argued that these charges are sufficient to challenge the admissibility of the case successfully.

Moreover, Libya asserted that the investigation is not vitiated by "unwillingness" or "inability". It is suggested that logistical aspects of the trial have been addressed and that an appropriate courtroom complex and prison facilities will be available. The assistance and support received by Libya from a number of United Nations agencies, the European Union and several national Governments, which focused on the provision of transitional justice measures, were said to have had a positive impact upon the prospective trial. Libya stressed that it has no reason to protect Mr. Al-Senussi from investigation or prosecution; that the suspect is in government-controlled custody; and that the necessary evidence and testimony are being collected pursuant to the domestic investigations. Libya insisted that there is no evidence to demonstrate that Libya is either unable or unwilling to carry out a genuine investigation into the case.

Accordingly, the Chamber was requested to declare the case against Mr. Al-Senussi inadmissible before the Court or, in the alternative, to consider implementing a positive approach to complementarity by declaring the case inadmissible subject to the fulfillment of express conditions or other ongoing obligations.

Guided by the jurisprudence of the Appeals Chamber on the interpretation of article 17 of the Statute, the Chamber concluded that, in considering an admissibility challenge, two questions must be addressed:

(a) whether, at the time of the proceedings in respect of an admissibility challenge, there is an ongoing investigation or prosecution of the case at the national level; and

(b) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution.

The first requirement involves a consideration of whether the Libyan investigation covers the "same case", characterized by two components: the same person and the same conduct. The Chamber noted that the Appeals Chamber has interpreted the latter to mean that the investigation or prosecution must cover "substantially" the same conduct. The Chamber stressed that the question of what constitutes "substantially the same conduct as alleged in the proceedings before the Court" will vary according to the concrete facts and circumstances of the case and requires, therefore, a case-by-case analysis.

The Chamber identified the conduct attributed to Mr. Al-Senussi in the proceedings before the Court, as set out in the warrant of arrest issued against him, read in conjunction with the Decision taken pursuant to article 58, and compared it with the conduct constituting the subject matter of the proceedings allegedly carried out by the Libyan judicial authorities, as emerging from the evidence presented by Libya in support of its challenge. The conduct alleged in the case before the Court was found to concern the individual criminal liability of Mr. Al-Senussi for killings and acts of persecution, by reason of their (real or perceived) political opposition to the Gaddafi regime, carried out against civilian demonstrators and political dissidents. The crimes were alleged to have been committed directly by Mr. Al-Senussi or through the Libyan security forces during the repression of demonstrations in Benghazi from 15 February 2011 until at least 20 February 2011, as part of a policy designed at the highest level of the Libyan State machinery to deter and quell, by any means, the revolution against the Gaddafi regime occurring throughout Libya.

The Chamber noted that the Decision taken pursuant to article 58 contains a list of particular "incidents" or "events". However, because they do not represent unique manifestations of Mr. Al-Senussi's alleged criminal conduct but are rather illustrative and non-exhaustive samples, the domestic proceedings need not concern each of those "incidents". Instead, the fact that the national proceedings encompass some of these "incidents", including those that are particularly violent or that appear to be significantly representative of the conduct attributed to Mr. Al-Senussi, was considered an indicator that the same case is being investigated.

The Chamber considered that the evidence submitted by Libya is sufficient to conclude that concrete and progressive steps are being taken by the domestic authorities in the proceedings against Mr. Al-Senussi. The Libyan authorities interviewed witnesses, obtained documentary evidence (such as medical reports, death certificates and written orders), and requested that external sources provide information relevant to the investigation. Multiple lines of investigation were pursued, witnesses were asked to clarify and elaborate on certain parts of their testimony, as well as requested to comment on information provided by other witnesses and on documentary evidence in the investigative record. The investigators inquired about issues of a potentially exculpatory nature, and the resulting information has been duly recorded. Victims reporting the commission of crimes were required to substantiate their assertions with documentary evidence.

The Chamber found that Libya had properly substantiated its assertion that the domestic authorities are seeking to clarify, through the concrete and progressive steps outlined above, the following relevant factual aspects:

(a) the existence of a policy to deter and quell, by any means, the demonstrations against the Gaddafi regime;

(b) the mobilization of militias and equipment, recruitment of mercenaries, incitement of individuals to kill the demonstrators, provision of supplies to the security forces and other arrangements for the repression of the civilian demonstrations, including the role of Mr. Al-Senussi and his alleged accomplices in these activities;

(c) Mr. Al-Senussi's command over the security forces, and his presence in Benghazi immediately after the outbreak of the revolution to manage the situation;

(d) the carrying out by the security forces of numerous attacks on civilian demonstrators in many areas of Benghazi between 15 and 20 February, causing the death of and serious injuries to countless civilians, as well as similar attacks conducted in the country throughout the period of the repression of the revolution against the Gaddafi regime;

(e) Mr. Al-Senussi's direct involvement in the shooting of the civilian demonstrators in Benghazi between 15 and 20 February 2011;

(f) the arrest of journalists, activists and civilians demonstrating against the Gaddafi regime and the role in some of these events of Mr. Al-Senussi and his alleged accomplices; and

(g) instances of detention and torture of civilian dissidents.

On this basis, the Chamber was satisfied that the Libyan investigations include the relevant factual aspects of Mr. Al-Senussi's conduct as alleged in the proceedings before the Court, and concluded, accordingly, that Libya has demonstrated it is undertaking domestic proceedings covering the same case as that before the Court within the meaning of article 17 (1) (a) of the Statute.

In relation to the second limb of the test, whether the State is unwilling or unable genuinely to carry out the investigation or prosecution, the Chamber recalled that the State challenging the admissibility of the case is required to substantiate all aspects of the admissibility challenge to the extent required by the concrete circumstances of the case. The Chamber recognized, however, that an evidentiary debate on Libya's unwillingness or inability will be meaningful only when doubts arise as to the genuine nature of the domestic proceedings. Indeed, although Libya carries the burden of proof, factual allegations raised by any party or participant must be sufficiently substantiated in order to be considered properly raised.

The Chamber's decision took into account, holistically, a broad range of factual allegations raised by the parties and participants that were considered both relevant and sufficiently substantiated. These included the quantity and quality of the evidence collected as part of the investigations related to Mr. Al-Senussi, the scope, methodology and resources of the investigation into Mr. Al-Senussi's case, the recent transfer to the Accusation Chamber of the case against Mr. Al-Senussi and his 37 co-defendants, the example of certain judicial proceedings conducted to date against other former officials of the Gaddafi era, and the efforts made to resolve

certain issues in the justice system through recourse to international assistance. The Chamber took into account the lack of legal representation for Mr. Al-Senussi, the serious security difficulties currently experienced across Libya, the absence of protection programmes for witnesses in the context of this precarious security situation and the difficulties faced by the national authorities in exercising control over certain detention facilities.

The Chamber considered that there is no indication that the proceedings against Mr. Al-Senussi are being undertaken for the purpose of shielding him from criminal responsibility such as would warrant a finding of "unwillingness" within the meaning of article 17 (2) (a) of the Statute. It also concluded that the national proceedings cannot be considered tainted by any unjustified delay which, in the concrete circumstances of the case, would be inconsistent with an intent to bring Mr. Al-Senussi to justice within the meaning of article 17 (2) (b). In addition, the Chamber found that the investigations into Mr. Al-Senussi's case are not being conducted in a manner inconsistent with the intent to bring Mr. Al-Senussi to justice, such as to justify a finding of unwillingness under the cumulative requirements of article 17 (2) (c). In the Chamber's view, the fact that Mr. Al-Senussi's right to benefit from legal assistance at the investigation stage is yet to be implemented did not warrant a finding of unwillingness under that provision, because there was no indication that this is inconsistent with Libya's intent to bring Mr. Al-Senussi to justice, rather it appeared to be a consequence of the current security situation in the country. Accordingly, the Chamber concluded that Libya is not unwilling genuinely to carry out its proceedings against Mr. Al-Senussi.

In relation to the "ability" of Libya to investigate and prosecute the case against Mr. Al-Senussi, the Chamber first addressed the possibility that Libya was "unable to obtain the accused" as a result of a total or substantial collapse or unavailability of its national judicial system within the meaning of article 17 (3) of the Statute. The Chamber found no reason to believe in this aspect of inability, because Mr. Al-Senussi is already in the custody of the Libyan authorities.

The Chamber went on to consider the ability of Libya "to obtain the necessary evidence and testimony", bearing in mind the evidence already gathered and the stage of the proceedings reached at the national level. The Chamber considered the effects of the current security situation across Libya, in particular the absence of effective witness protection programmes, as well as the fact that certain detention facilities are yet to be transferred under the authority of the Ministry of Justice. However, unlike the case against Mr. Gaddafi, where Libya did not satisfactorily demonstrate that it had collected more than a few sparse items of evidence as part of its investigations, the domestic proceedings against Mr. Al-Senussi have so far not been prejudiced by these challenges. Indeed, Libya has provided a considerable amount of evidence, including several relevant witness and victim statements, as well as documentary evidence such as written orders, medical records and flight documents. At least one of the witnesses was interviewed while in detention, and several prospective witnesses are currently detained in the Al-Hadba prison of Tripoli, which is under the control of the Government of Libya. Thus, the Chamber concluded that these factors cannot be said to render Libya unable genuinely to carry out its proceedings.

Taking into account all the relevant circumstances, the Chamber found no other way in which Libya was "otherwise unable to carry out its proceedings" as a result of a total or substantial collapse or unavailability of its national judicial system, which would have satisfied the residual aspect of inability in article 17 (3) of the Statute. The Chamber observed that Mr. Al-Senussi's lack of legal representation in the national proceedings did not lead to such inability. In contrast to the case of Mr. Gaddafi, for whom attempts to secure legal representation have repeatedly failed, in the present case it was submitted that several local lawyers from Mr. Al-Senussi's tribe recently indicated their willingness to represent Mr. Al-Senussi in the domestic proceedings, although they have not yet been given a formal power of attorney.

The Chamber concluded that the case against Mr. Al-Senussi is being investigated by Libya and that Libya is not unwilling or unable genuinely to carry out the investigation. Thus, the case against Mr. Al-Senussi was considered inadmissible before the Court pursuant to article 17 (1) (a) of the Statute.

Finally, the Chamber noted article 19 (10) of the Statute which provides that: "If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17." The Prosecutor may therefore seize the Chamber with a request for review of the present decision as appropriate.